

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 28801

GREGORY A. PIERCE,)	2004 Opinion No. 24
)	
Petitioner-Appellant,)	Filed: March 25, 2004
)	
v.)	Frederick C. Lyon, Clerk
)	
STATE OF IDAHO,)	
)	
Respondent.)	
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael R. McLaughlin, District Judge.

Order of the district court dismissing petition for post-conviction relief, affirmed.

Greg S. Silvey, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Ralph Reed Blount, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

Gregory A. Pierce appeals from the district court's order dismissing his petition for post-conviction relief. We affirm, albeit on different grounds.

I.

FACTUAL AND PROCEDURAL SUMMARY

Pierce was found guilty by a jury of eluding a peace officer and of unlawful possession of a firearm. Pierce was sentenced to a unified term of five years, with three years determinate, for eluding a peace officer and to a consecutive unified term of five years, with two years determinate, for unlawful possession of a firearm.

On direct appeal, this Court affirmed Pierce's judgment of conviction and sentence. *See State v. Pierce*, No. 25806 (Ct. App. August 21, 2000), unpublished. Pierce's appellate counsel, in consultation with two other attorneys at the State Appellate Public Defender's office, decided to not file a petition for review of the decision in the Idaho Supreme Court. However, Pierce was

not informed of this decision; neither was he informed that he had the right to file such a petition *pro se*.

Pierce subsequently filed the current post-conviction relief petition, alleging ineffective assistance of appellate counsel. Pierce attached an affidavit from his appellate counsel in which she confirmed that she had not notified Pierce of his right to file a petition for review. The district court held an evidentiary hearing, and the state stipulated to the facts as contained in appellate counsel's affidavit. The district court issued a memorandum opinion that denied post-conviction relief on the basis that Pierce lacked meritorious grounds for a petition for review, and therefore had not been prejudiced by his appellate counsel's conduct. Pierce appeals.

II.

ANALYSIS

As an initial matter, we are faced with two differing interpretations of the issue before us. Pierce contends that this issue is one of ineffective assistance of counsel. The state contends the issue is whether Pierce had any right to counsel at all. The state's assertion must be considered first, because the right to *effective* counsel is only triggered once a right to counsel exists.

The state contends that although the district court correctly denied Pierce relief, it skipped the predicate step of determining whether Pierce had a right to the assistance of counsel in filing a petition for review in the first place. The state argues that without a right to counsel, there can be no deficient performance, let alone resulting prejudice. The Fourteenth Amendment right to the effective assistance of counsel is derived entirely from the Fourteenth Amendment right to counsel. *See Wainwright v. Torna*, 455 U.S. 586 (1982). In *Torna*, the United States Supreme Court concluded that a state criminal defendant has no Fourteenth Amendment right to the assistance of counsel when pursuing discretionary review after an appeal as of right. *Torna*, 455 U.S. at 588-89. The Idaho Supreme Court has not yet addressed the potential existence of a right to counsel under the state constitution, but has implicitly acknowledged the logic of *Torna* in *Hernandez v. State*, 127 Idaho 685, 905 P.2d 86 (1995), on review from *Hernandez v. State*, 127 Idaho 690, 905 P.2d 91 (Ct. App. 1995) (if a defendant has no constitutional right to counsel in a discretionary appeal, he cannot be deprived of constitutionally mandated effective assistance of counsel by his counsel's failure to timely file an application for review to the state Supreme Court).

Though there may be no constitutional right to effective assistance of counsel in filing a petition for review, lawmakers in Idaho have seen fit to statutorily ensure that needy defendants have the right to appointed counsel in any appeal. See I.C. §19-852. However, I.C. § 19-852, qualifies the entitlement of a needy defendant to representation in post-conviction proceedings. Such a petitioner is entitled:

. . . unless the court in which the proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense and is therefore a frivolous proceeding.

I.C. § 19-852(b)(3). Accordingly, Pierce's claim of ineffective assistance of counsel is dependent upon whether Pierce was entitled to counsel for a petition for review, which in turn is contingent upon whether a reasonable person with adequate means would be willing to bring a petition identical to Pierce's at his own expense.

Although the district court skipped the predicate step of determining whether Pierce had a right to counsel, and therefore failed to engage in an I.C. § 19-852(b)(3) analysis, it concluded, per the two-pronged *Strickland v. Washington*, 466 U.S. 668 (1984) test¹ of ineffective assistance of counsel, that:

The Court is satisfied that Petitioner did not receive notice that the State Appellate Public Defender's Office had opted not to [file a discretionary] appeal on his behalf. However, the Court finds [that] had [a petition for review] been filed it would not have altered Petitioner's situation. The Court has reviewed the underlying case, as well as the Court of Appeals unpublished decision, and finds that Petitioner did not have meritorious grounds for reconsideration of the Court of Appeals decision.

The district court implied that the question of whether Pierce's counsel rendered ineffective assistance is secondary because in any event, Pierce was not prejudiced by his counsel's actions or lack thereof.

The distinction between the district court's analysis, which focused on an absence of prejudice, and the I.C. § 19-852(b)(3) analysis, which focuses on the presence of frivolity, is negligible in this case. The district court determined that Pierce did not have meritorious grounds for reconsideration of his appeal in the Idaho Supreme Court. We conclude that a

¹ Under *Strickland*, a petitioner must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) that the petitioner was prejudiced by this deficiency.

reasonable person of adequate means would not be willing to pursue, at his own expense, a case that lacked meritorious grounds.

The district court's conclusion that Pierce did not have meritorious grounds to seek review before the Idaho Supreme Court is not challenged on appeal. Nevertheless, Pierce asserts that from a "rational appellant's perspective, there is no downside and a large potential upside to at least seeking review over the Court of Appeals' decision." This misstates the burden that Pierce must carry. The question is not whether it might be rational to file for review, assuming zero opportunity costs, but whether a reasonable person would be willing to proceed at his own expense.

Pierce has presented no evidence or argument indicating that the district court erred in determining that Pierce lacked meritorious grounds for reconsideration, though he does concede that his are "perhaps not the strongest claims in the continuum of appellate issues," a proposition with which we agree. Accordingly, we conclude that Pierce has failed to carry the burden of establishing that his pursuit of review was not frivolous. Therefore, Pierce was not entitled to representation, pursuant to I.C. § 19-852(b)(3). As Pierce was not entitled to representation, his argument that he received ineffective representation fails.

III.

CONCLUSION

Based on the reasons stated above, we affirm the district court's order denying Pierce's petition for post-conviction relief.

Chief Judge LANSING and Judge PERRY **CONCUR.**